LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
MAY 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. ~~1022~~ 136

In the Matter of the Application for a Review under Article 13 of the Tax Law of a Tax Assessment by

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
Petitioner-Respondent,

against

THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK, and THE TOWN OF RIVERHEAD, a party by operation of law,
Respondents-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REGINALD C. SMITH,
Counsel for Petitioners.

CHARLES A. ELLIS,
of Counsel

INDEX TO PETITION

	PAGES
The Opinions of the Courts Below	2
Jurisdiction	2
Questions Presented	3
Constitutional and Statutory Provisions Involved	4
Statement of the Case	4
Reasons for Allowance of the Writ	8
Conclusion	24

TABLE OF CASES CITED

Alabama v. *King & Boozer*, 1941, 314 U. S. 1	24
American Locker Co. v. *City of New York*, 1955, 308 N. Y. 264	20
Brogan v. *National Surety Co.*, 1918, 246 U. S. 257	20
Buckstaff Bath House Co. v. *McKinley*, 1939, 308 U. S. 358	21
Case v. *Bowles*, 1946, 327 U. S. 92	23
Central Pacific Railroad v. *Nevada*, 1896, 162 U. S. 512	14
City of New Brunswick v. *United States*, 1928, 276 U. S. 547	24
Cooper v. *Roberts*, 18 How. (59 U. S.) 173	16
Ex parte Gaines, 1892, 56 Ark. 227	21
Fleischmann Co. v. *United States*, 1926, 270 U. S. 349	20

PAGES

Gay v. *Jemison*, (Fla. 1951), 52 So. 2d 437 10
Gibson v. *Choteau*, 1871, 13 Wall. (80 U. S.) 92 19
Gould v. *Gould*, 1917, 245 U. S. 151 20
Guaranty Co. v. *Pressed Rock Co.*, 1903, 191 U. S. 416 20

Heydenfeldt v. *Daniel Gold and Silver Mining Co.*, 1877, 93 N. S. 634 ..... 17, 18

Jetton v. *University of the South*, 1908, 208 U. S. 489 10
Jones v. *Soulard*, 24 How. (65 U. S.) 41 16

Kern-Limerick Inc. v. *Scurlock*, 1954, 347 U. S. 110 .. 23
Kissell v. *St. Louis Public Schools*, 18 How. (59 U. S.) 19 16

Light v. *United States*, 1911, 220 U. S. 523 15

MacEvoy v. *United States*, 1944, 322 U. S. 102 15
Matter of Good Humor Corp. v. *McGoldrick*, 1943, 289 N. Y. 452 20
McCarthy v. *Mann*, 1873, 19 Wall. (86 U. S.) 20 21

Offutt Housing Company v. *County of Sarpy*, 1956, 351 U. S. 253 ..... 13, 19
Offutt Housing Company v. *County of Sarpy*, 1955, 160 Neb. 320, 70 N. W. 2d 382 ..... 10, 12

Parkbelt Homes v. *United States*, 4 Cir., 1948, 171 F. 2d 230 11

Ruddy v. *Rossi*, 1918, 248 U. S. 104 15
Rutherford v. *Greene*, 1817, 2 Wheat. (15 U. S.) 196 13

S. R. A. v. *Minnesota*, 1946, 327 U. S. 558 ..... 12, 15, 22
Standard Accident Insurance Co. v. *United States*, 1938, 302 U. S. 442 20
Superior Bath House Co. v. *McCarroll*, 1941, 312 U. S. 176 21

PAGES

Trimble v. *Seattle*, 1914, 231 U. S. 683 ..... 11, 12

United States v. *California*, 1946, 332 U. S. 19 15
United States v. *County of Allegheny*, 1944, 322 U. S. 174 ..... 7, 9, 15, 18, 19, 22
United States v. *Gratiot*, 1840, 14 Pet. (39 U. S.) 526 15
United States v. *Parkbelt Homes*, D. C. Md., 1948, 76 F. Supp. 297 11
United States v. *San Francisco*, 1940, 310 U. S. 16 .. 15, 16, 17

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

United States Constitution

Art. 1, § 8, cl. 18 ..... 3, 4, 7, 9, 19, 24
Art. 4, § 3, cl. 2 ..... 3, 4, 7, 9, 15, 19, 21, 24
Art. 6, cl. 2 ..... 3, 4, 7, 9, 19, 23, 24

10 U. S. C. § 2667(e) 16

28 U. S. C. § 1257(3) 3, 8

28 U. S. C. § 2101(e) 3

34 U. S. C. § 522a 3, 4, 5

34 U. S. C. § 522c 3, 4, 7, 8, 9, 10, 12, 14, 17, 18
(Act of August 5, 1947, c. 493, 61 Stat. 774, and § 1 of Act of Sept. 28, 1951, c. 434, Title VI, § 605, 65 Stat. 366)

40 U. S. C. §§ 521, 523 10

Former 40 U. S. C. § 432, 49 Stat. 2036 11

42 U. S. C. § 1546 10

Former 42 U. S. C. § 1546, 54 Stat. 1127 11

Public Law 874, 81st Cong., § 9, par. 1 10

Public Law 1028, 84th Cong., c. 1041, 70A Stat. 150 .. 16, 17

New York Tax Law, 59 McKinney's Consolidated Laws of New York, Part 1, § 3 and § 4, pars. 1 and 17 ..... 4, 5, 24

COMMITTEE AND COMMISSION REPORTS CITED

PAGES

Committee Report on Payments in Lieu of Taxes and Shared Revenues, June, 1955, submitted to the Commission on Intergovernmental Relations 10

Report on Federal Contributions to States and Local Governmental Units with Respect to Federally Owned Real Estate, House Doc. No. 216, 78th Cong. 1st Sess. (1943) 10

The Commission on Intergovernmental Relations, Report to the President for Transmittal to the Congress, June, 1955 10

INDEX TO APPENDIX

Constitutional and Statutory Provisions Involved... 25

Decision—Opinion of Hogan, J., Supreme Court, Suffolk County (Court of first instance)..... 30

Opinion of Reversal, New York Supreme Court, Appellate Division, Second Department (first appellate court) 39

Opinions in New York Court of Appeals (final State appellate court)..... 41

Judgment of Court of Appeals in Question..... 55

Order of Supreme Court on Court of Appeals Remittitur 57

Order of Court of Appeals Denying Reargument But Amending Remittitur 59

Order of Supreme Court on Amendment of Remittitur 60

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. _____

In the Matter of the Application for a Review under Article 13 of the Tax Law of a Tax Assessment by

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
Petitioner-Respondent,

against

THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK, and THE TOWN OF RIVERHEAD, a party by operation of law,
Respondents-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners, The Board of Assessors of the Town of Riverhead, New York, and the Town of Riverhead, Respondents below, pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, and the judgment of the Supreme Court of the State of New York, Suffolk County, entered thereon, in the above entitled matter.

The Opinions of the Courts Below

The opinion of the Supreme Court, Special Term, Suffolk County (R. 61-70; Hogan, J.), printed in the Appendix hereto, infra, p. 30, is reported in 3 Misc. 2d 339, and 148 N. Y. Supp. 2d 24.

The opinion and dissenting opinion of the Appellate Division, Second Department (R. 78-79), printed in the Appendix hereto, p. 39, are reported in 1 App. Div. 2d 1021, and 151 N. Y. Supp. 2d 786.

The original opinion and dissenting opinion in the New York Court of Appeals, printed in the Appendix hereto, p. 41, are not yet officially reported.

The opinion of the New York Court of Appeals on motion for reargument or in the alternative to amend the remittitur, printed in the Appendix hereto, p. 59, is reported in The New York Law Journal, April 16, 1957, vol. 137, No. 73, p. 4, col. 8, but is not yet officially reported.

Jurisdiction

The decision and judgment of the New York Court of Appeals sought to be reviewed was dated and remitted to the Supreme Court, Suffolk County, March 8, 1957. The order on remittitur made by the Supreme Court of the State of New York, Suffolk County, making the order of the Court of Appeals the order of the Supreme Court, was dated and entered March 27, 1957.

Thereafter petitioners made a timely motion for reargument and in the alternative to recall and amend the remittitur; and on April 12, 1957, the Court of Appeals made an order denying reargument but granting the motion to amend the remittitur. The order on amendment of remittitur made by the Supreme Court of the State of New York, Suffolk County, making the order of the Court of

Appeals the order of the Supreme Court, was dated and entered April 23, 1957.

The jurisdiction of this Court is found in 28 U. S. Code, §§ 1257(3) and 2101(e).

Questions Presented

1. Whether the decision herein unlawfully deprives the petitioners, Town of Riverhead and its Board of Assessors, of a right and privilege established for their benefit by Congress in exercise of its plenary powers under Art. 4, § 3, cl. 2 and Art. 1, § 8, cl. 18 of the United States Constitution; and whether this also violates Art. 6, cl. 2 of the United States Constitution.

2. Whether by § 6 of the Act of August 5, 1947 (34 U. S. C. A. § 522e) Congress effectively mandated, conditioned or required that the interest of Grumman, when made or created in 1954 pursuant to the provisions of such Act of Congress, be then and thereby made subject to local taxation by petitioners.

3. Whether the national policy and program of relieving local governments of the disastrous impact on their revenues of Government exemptions, and the manifest purpose and intent of Congress in enacting 34 U. S. C. A. § 522e and related legislation, are such as to require that the Federal statute, Federal contract and such State laws as affect the carrying out of such national policy and program be liberally interpreted in favor of rather than strictly interpreted against the right and power of petitioners to tax the interest of Grumman under its contract with the United States.

4. Whether the decision herein erroneously makes Grumman the beneficiary, at the expense of the United States and the Town, of funds intended by Congress for the benefit of the Town, and permits Grumman to make the United States and the Town the victims rather than the

beneficiaries of the United States exemption, the Act of Congress in exercising its plenary power, and the Federal contract by which the interest of Grumman was made and created subject to local taxation.

5. Whether by 34 U. S. C. A. § 522e and the Federal contract made pursuant thereto Grumman is precluded from pleading and the State courts are precluded from considering on Grumman's behalf any exemption of the United States or that a local assessment by petitioners of the interest of Grumman is an indirect tax on or an indirect attempt to tax property of the United States which is exempt from tax.

Constitutional and Statutory Provisions Involved

The Constitutional provisions involved are Art. 4, § 3, cl. 2; Art. 1, § 8, cl. 18 and Art. 6, cl. 2 of the United States Constitution, printed in the Appendix, infra, pp. 25-27.

The Federal statutory provisions involved are Sections 1 and 6 of the Act of August 5, 1947, c. 493, 61 Stat. 774, 775, and amendment to Section 1 by Act of September 28, 1951, c. 434, Title VI, § 605, 65 Stat. 366; 34 U. S. C. §§ 522a and 522e, printed in the Appendix, infra, pp. 25-27.

The New York State statutory provisions involved are Tax Law, 59 McKinney's Consolidated Laws of New York, Part 1, § 3 and § 4, pars. 1 and 17, printed in the Appendix, infra, pp. 27-29.

Statement of the Case

By agreement of April 1, 1954 (R. 15), between the United States and Grumman Aircraft Engineering Corporation,* a New York corporation, Grumman leased from

---

* Hereinbefore in Questions Presented and hereinafter referred to as Grumman.

the United States, with an option to purchase, the valuable plant and facilities established by the Government for Grumman's use at Calverton, Suffolk County, New York, the greater part of which is in the Town of Riverhead, New York.

The agreement specifically was "made under the authority of and in accordance with the provisions of the Act approved August 5, 1947 (34 U. S. C. 522a)" (R. 16). It specified a term of five years, with an option to Grumman to renew for two successive five year periods (R. 17-18); a right of Grumman to use the property "For all general industrial purposes" (R. 18); and an option to Grumman to purchase the facilities at their original cost to the Government less depreciation at 3% should the Government determine the facilities to be excess to the further needs of the Department (R. 29).

Deeming the interest of Grumman as one "made or created pursuant to the provisions" of the Act of August 5, 1947, and, under 34 U. S. C. § 522e, thereupon and thereby effectively severed for tax purposes from exempt Government ownership, and "made subject to State or local taxation", the Board of Assessors of the Town of Riverhead assessed taxes against the Grumman interest for the years 1954-1955 and 1955-1956 (R. 40-43). In conformity with the New York Tax Law exemption provision, Tax Law § 4(17), that the assessors use "the addition to the description of the words 'interest under contract,' or other appropriate words descriptive of the interest in the property so assessed" (59 McKinney's Consol. Laws of N. Y., Part I, § 4, par. 17), the assessments specified a fractional "interest under contract with U. S. of 4/1/54", and stated that the interest of the United States "is not assessed or taxed" (R. 40-43).

Grumman filed an objection and protest (R. 40), alleging the assessments to be void because they purport to measure the value "of an interest which does not exist and which

under the contract of lease, relied upon by the assessors, can not exist as a matter of law" (R. 46), and that

> "The attempt to tax petitioner as a lessee of Government property upon a purely fictitious hypothesis constitutes an indirect effort to tax property of the United States Government contrary to the provisions of the Tax Law of the State of New York, Article I, Sect. 4, and of the Constitution of the United States and laws enacted thereunder, and as such is illegal and void" (R. 47).

The Federal questions sought to be reviewed thus were first raised in the original objection and protect of Grumman.

Grumman then petitioned the New York Supreme Court, Suffolk County, to order the Assessors "to strike said assessments against your petitioner from the rolls and that the said premises be shown on said rolls as exempt property" (R. 14). Its petition, showing the same assessments (R. 8-11), alleged that the assessments were illegal, erroneous and void

> "on the ground that the assessments are against real property owned by the United States of America which is specifically exempt from tax under the provisions of the Tax Law of the State of New York, Article I, Section 4, and the Constitution of the United States; on the ground that they are illegal and void, being an indirect assessment and tax on real property of the United States of America, which is specifically exempt from tax by law as aforesaid" (R. 13).

The Federal questions sought to be reviewed thus were raised in the court of first instance by the petition of Grumman to that Court.

Your petitioners, respondents below, moved to dismiss the Grumman petition as failing to state facts sufficient to warrant relief (R. 48).

On argument of the motion Grumman's counsel relied on "the case of County of Allegheny, which is the Mesta Machine case" (R. 56), i.e., *United States* v. *County of Allegheny*, 1944, 322 U. S. 174, which, at p. 182 quotes, and throughout discusses the effect of Art. 4, § 3, cl. 2; Art. 1, § 8, cl. 18 and Art. 6, cl. 2 of the United States Constitution, relied on by your petitioners herein. Thenceforth, and on the hearing of the appeals in the Appellate Division and the Court of Appeals, the *United States* v. *County of Allegheny* decision, its applicability herein, and its construction of the said Constitutional provisions were a major subject of contention. The decision is cited in the dissenting opinion in the Appellate Division and is cited and quoted from in the majority opinion of the Court of Appeals.

The Supreme Court at Special Term denied your petitioners' motion to dismiss, and granted Grumman judgment that "the petition is sustained" and, holding the assessments illegal, erroneous and void, ordered them stricken from the assessment roll (R. 60).

Your petitioners appealed to the Appellate Division, Second Department; and that Court reversed four to one (R. 78-79; Appendix, infra, pp. 39-40).

Grumman then appealed to the Court of Appeals; and that Court reversed the Appellate Division and reinstated the Special Term judgment, four to three (Appendix, infra, p. 54).

On motion by your petitioners for reargument or in the alternative to amend the remittitur, the Court of Appeals denied the motion for reargument, but granted the motion to amend the remittitur, and certified that upon the appeal "there was presented and necessarily passed upon a question under the Constitution and statutes of the United States," citing your petitioners' reliance on Article IV, cl. 3; Article I, cl. 18 and Article VI, cl. 2 of the Constitution, the Act of August 5, 1947, c. 493, § 6, 34 U. S. C. § 522c, and

the contract between Grumman and the United States Government (Appendix, infra, p. 59).

Reasons for Allowance of the Writ

The case is one in which title, right, privilege and immunity of the parties have been set up and claimed under the Constitution and statutes of the United States, and where the validity of a state statute, as construed by the New York Court of Appeals, is drawn in question on the ground of its being repugnant to the Constitution and laws of the United States (28 U. S. C. A., § 1257, par. (3)). And the decision fails to accord with and conflicts in fundamental principle with decisions of this Court.

The Court of Appeals of the State of New York, by a bare majority—four to three—has deprived the petitioners, Town of Riverhead and its Board of Assessors, of the right and privilege (28 U. S. C. A. § 1257, par. (3)), under the Act of August 5, 1947 (34 U. S. C. A. § 522e) and respondent's contract thereunder, to tax the "lessee's interest" made and created pursuant to the provisions of said Act of Congress. It reversed the Appellate Division, Second Department, which had ruled four to one in petitioners' favor after a Justice of the Supreme Court at Special Term had ruled for respondent. The State court judges thus have been so divided that seven have voted in favor of petitioners and six in favor of respondent*, but with the Court of Appeals decision controlling, four to three, against petitioners.

In so ruling the Court of Appeals majority, by intermixed arguments based on Federal and preexisting State

---

* Judges voting to sustain the tax: In the Court of Appeals, Conway, Ch. J., Fuld and Burke, JJ. (3); In the Appellate Division, Beldock, Murphy, Ughetta and Kleinfeld, JJ. (4); total 7.

Judges voting against the tax: In the Court of Appeals, Dye, Dysmond, Froessel and Van Voorhis, JJ. (4); In the Appellate Division, Wenzel, Acting P.J. (1); In Special Term, Hogan, J. (1); total 6.

laws of exemption from local taxation, has misinterpreted and misapplied this Court's decision in *United States* v. *County of Allegheny*, 1944, 322 U. S. 174, and has failed to give effect to

1. The provisions of Art. 4, § 3, cl. 2 and Art. 1, § 8, cl. 18 and Art. 6, cl. 2 of the United States Constitution;

2. the terms and conditions of 34 U. S. C. A. § 522e statutorily imposed by Congress in exercise of its plenary and unlimited power under Art. 4, § 3, cl. 2 of the Constitution; and to

3. the terms and conditions of the agreement of April 1, 1954 made between Grumman and the Government pursuant to said Act of Congress; and

4. has permitted Grumman to violate, override and circumvent the Constitution of the United States, the provisions of the Act of Congress, and the terms and conditions of the Federal contract by which the interest of Grumman was made and created; and

5. has given Grumman the benefit of a strict construction against the Town, instead of giving the Town the benefit of a liberal or practical construction such as required in order to promote the national policy instituted by Congress for benefit of the local community.

The decision in effect makes Grumman the beneficiary, at the expense of the United States and the Town, of funds or rights to funds intended by Congress for the benefit of the Town, and thus permits Grumman to make the United States the victim rather than beneficiary and sole dispenser of an alleged exemption of the United States.

This Court has recognized that the amount of rent a lessee pays to an exempt landlord is affected by whether the lessee is or is not entitled to share the landlord's exemption. "If . . . the interest of the lessee in the land so leased should be exempt from taxation, it may readily be seen that the amount of rent which it would

receive would be larger than if no such exemption could be obtained" (*Jetton* v. *University of the South*, 1908, 208 U. S. 489, 501).

Since the Grumman lease herein was made under an Act of Congress (34 U. S. C. A. § 522e) specifically providing that "The lessee's interest, *made* or created pursuant to the provisions of . . . this title, shall be *made* subject to State *or local* taxation", it is readily apparent that the United States has charged Grumman less rent than would be the case if Grumman's interest had been *made* in any sense whatever exempt from local taxes.

Hence "it is obvious that any money withheld from the state by applying the exemption would not benefit the national exchequer but would reach the pockets of private citizens" (*Offutt Housing Company* v. *County of Sarpy*, 1955, 160 Neb. 320, 70 N. W. 2d. 382, 393; *Gay* v. *Jemison*, (Fla. 1951), 52 So. 2d 137, 138), viz, Grumman.

The United States, moreover, would be doubly victimized, if it perform obligations it has undertaken in accordance with other provisions made by Congress for alleviating the impact on local government revenues of Government exemptions. For Congress employs two methods: First, it provides for taxation of the lessee's interest, as in 34 U. S. C. A. § 522e. Second, it provides for payments to the local government "in lieu of taxes" with respect to the Government's interest. See 40 U. S. C. A. § 521, 523; 42 U. S. C. A. § 1546; see also Public Law 874, 81st Congress, § 9, par. 1; and see *Committee Report on Payments in Lieu of Taxes and Shared Revenues*, June, 1955, submitted to the Commission on Intergovernmental Relations, and *The Commission on Intergovernmental Relations, Report to the President for Transmittal to the Congress*, June, 1955. See also *Report on Federal Contributions to States and Local Governmental Units with Respect to Federally owned Real Estate*, House Doc. No. 216, 78th Cong. 1st Sess. (1943).

The Federal Government's policy of making payments to local governments "in lieu of taxes" antedated the enact-

ment of the Act of August 5, 1947. The earlier Bankhead and Lanham Acts, former 40 U. S. C. A. § 432, 49 Stat. 2036, and 42 U. S. C. A., § 1546, 54 Stat. 1127 provided for payments to local communities in lieu of taxes. See *United States* v. *Parkbelt Homes*, D. C. Md., 1948, 76 F. Supp. 297, 299, aff'd. *Parkbelt Homes* v. *United States*, 4th Cir., 1948, 171 F. 2d 230. But the attempt of a Government lessee, such as Grumman, to avoid its proportion of local taxes, or its liability to local taxation, on the basis of alleged Government exemption is novel in this court.

To exempt Grumman herein is in reality to require the United States Government to pay twice: once, by its fixing the Grumman rental at a smaller amount to allow for Grumman's liability to "local" taxation of its lessee interest, and again by the increase of the Government's payments to the Town and School Districts "in lieu of taxes", by reason of Grumman's failure to pay a tax on the "lessee's interest".

This makes Grumman the beneficiary and the United States the victim of an alleged but non-existent or inapplicable exemption of the United States. It makes Grumman the beneficiary of an exemption which the statute under which its contract was made itself provided Grumman should not be entitled to.

To exempt Grumman herein also makes of the Grumman leasehold "a favored class of property" (*Trimble* v. *Seattle*, 1914, 231 U. S. 683, 689-690), directly contrary to the Congressional mandate and Federal contract that it should not be so made. Contrasting with private leases from private landlords the cases "When an interest in land, whether freehold or for years is *severed from the public domain and put into private hands*" (231 U. S. 690), this Court said:

> "If these leaseholds are not taxable, they are a favored class of property; for ordinarily *leaseholds are taxed* even if they are lumped and included in the value of the fee" (231 U. S. 689-690). (Italics ours).

To exempt Grumman herein also, in the language of *Offutt Housing Company* v. *County of Sarpy*, *supra*, 160 Neb. 320, 70 N. W. 2d 382, 392, "would permit plaintiff to perpetrate a sham and fraud upon the state and its governmental subdivisions",—as well as a sham and fraud upon the United States. For Grumman in its Petition, pars. 10 and 14, R. pp. 12, 13, pleaded falsely that the assessments were "an indirect attempt to tax" or "an indirect assessment and tax on" real property of the United States "which is specifically exempt from tax". And the 4-3 majority opinion of the New York Court of Appeals herein gives effect to this contention of Grumman in holding that "The property is not taxable *by virtue of the overriding immunity of the United States Government as owner*. It is the local government which is attempting to levy a tax *where the property is already immune from taxation*". (Italics ours). **(Appendix, infra, p. 50).**

This contention of Grumman and this holding by the New York Court of Appeals majority is notwithstanding that the assessments herein all specify only a fractional

> "interest under contract with U. S. of 4/1/54. The interest of the United States or of this State in the foregoing property is not assessed or taxed" (R. pp. 40-43, ff. 120, 122, 123, 125, 126, 128).

The Town thus "took care to leave unassessed whatever interest the United States holds" (*S. R. A.* v. *Minnesota*, 1946, 327 U. S. 558, 565).

This contention of Grumman and this holding of the Court of Appeals majority also ignore the fact that Congress by 34 U. S. C. A. § 522e, and the Government and Grumman by their contract made under and in accordance with the Act of Congress, have effectively "*severed* from the public domain and put into private hands", as a *severed* interest, the interest of Grumman, (cf. *Trimble* v. *Seattle*, *supra*, 231 U. S. 683, 690).

In *Offutt Housing Co.* v. *County of Sarpy*, 1956, 351 U. S. 253, this Court, in affirming the Nebraska Supreme Court decision above cited, said of the 1947 Act of Congress, that

> "The legislative history indicates a concern about loss of revenue to the States and a desire to prevent unfairness toward competitors of the *private interests* that might otherwise escape taxation." (Italics ours).

This concern and this desire, and the language of the Federal statute—itself effectuating for local tax purposes a complete *severance* between the private "lessee's interest" and the Government's ownership—make the decision of the majority below one requiring review by this Court as being based upon a completely erroneous treatment of the strictly Federal questions of exemption, of national policy and national aid to local governments, and of Federal contract and property rights created under and subject to an Act of Congress effectively severing the same and providing that "The Lessee's interest . . . shall be *made* subject to State *or local* taxation."

The decision clearly is not in accord with applicable decisions of this Court or the public policy of the United States evidenced by the Statute of Congress and the Federal contract made pursuant thereto.

In *Rutherford* v. *Greene*, 1817, 2 Wheat. (15 U. S.) 196, 198, a statute provided "that 25,000 acres of land *shall be* allotted for and given to Major-General Nathaniel Greene." This Court, by Chief Justice Marshall, said:

> "the words of this section contain *a positive mandate* to them to set apart 25,000 acres for General Greene. As the act was to be performed in future, the words directing it are necessarily in the future tense. 'Twenty-five thousand acres of land *shall be* allotted for, and given to, Major-General Nathaniel Greene.' *Given when?* The answer *is unavoidable* —when they shall be allotted. *Given how?* Not by any *future* act:— for it is not the practice of legisla-

> tion to enact, that a law shall be passed by some future legislature:—but given *by force of this act.*" (15 U. S. 198). (Italics ours).

So, here, the words of § 522e contain "a positive mandate" (15 U. S. 198) that "The lessee's interest, *made or created* pursuant to the provisions . . . of this title, *shall be made* subject to State *or local* taxation." *Made subject when?* The answer here equally "is unavoidable"—i.e., when the lessee's interest shall be "*made* or created" pursuant to the Act: in this case, April 1, 1954. *Made subject how?* Not by any future legislation of either Congress or a State; for this would be to enact that a law shall be passed by some other or future legislation:—but "*made* subject to State *or local* taxation" *by force of* § *522e*, whenever the lessee's interest is "*made or created*" pursuant to that Act. It was, perhaps, not a mandate to tax; *but it was a mandate that the lessee's interest be subject to State "or local" taxation.* It was, moreover, a mandate inconsistent with and which precludes the lessee pleading or a State court holding that a tax on the lessee's interest was an indirect attempt to tax property of the United States which is exempt from tax.

In *Central Pacific Railroad* v. *Nevada*, 1896, 162 U. S. 512, 523, even where the provision was negatively that no lands previously granted shall be exempted on account of the lien of the United States, this Court said:

> "No action on the part of the State or its legislature was necessary to signify its acceptance of the authority conferred by the Federal statute . . . where a simple power is given, no acceptance of such power by the State is necessary as a preliminary to its exercise" (162 U. S. 523).

Certainly here, where the statute, § 522e, is *positive*, and where unless the "*lessee's interest*" is subjected to "local taxation" the lessee will be enriched by money intended for the Town, no action on the part of the State was necessary

to signify its acceptance for the Town of the authority and privilege conferred upon the Town by the Federal statute.*

This is more particularly true where, as here, there is not a mere grant by Congress of a power while titles remain unaltered, but a condition and requirement imposed for the benefit of the town in the very exercise by Congress of its plenary power under Art. 4, § 3, cl. 2 of the Constitution to "dispose of" property of the United States.

Under Art. 4, § 3, cl. 2, the power of Congress "to dispose of and make all needful Rules and Regulations respecting . . . Property belonging to the United States" is without limitation (*United States* v. *San Francisco*, 1940, 310 U. S. 16, 29; *United States* v. *California*, 1946, 332 U. S. 19, 27; *United States* v. *Gratiot*, 1840, 14 Pet. (39 U. S.) 526, 537-538).

A lease of federal property—even without it containing an option to purchase at a given price such as granted here—is made in exercise by Congress of its plenary power to "dispose of" property of the United States, and represents, as to the lessee's interest, equally as would a sale, a disposal of property of the United States (*United States* v. *Gratiot, supra*, 14 Pet. 538; *United States* v. *County of Allegheny*, 1944, 322 U. S. 174, 182). The property "may be leased, sold or given away upon such terms and conditions as the public interests require" (*Ruddy* v. *Rossi*, 1918, 248 U. S. 104, 106). "The United States can prohibit absolutely or *fix the terms on which its property may be used*" (*Light* v. *United States*, 1911, 220 U. S. 523, 536). (Italics ours.)

Congress, could, therefore, lease the property to Grumman on such terms as Congress saw fit to prescribe, including the right to buy, and the subjection of Grumman's interest to local taxation. It could have provided that the rent be paid to the Town, and it could equally provide for

---

* Acceptance by the Town, itself, is shown "by its levy of a tax" (*S. R. A.* v. *Minnesota*, 1946, 327 U. S. 558, 564) on the lessee's interest.

payment by Grumman to the Town of a tax. It could have provided for State but not local taxation, or for local but not State taxation, or for State or local taxation.

When Congress prescribes municipal or other local rights in disposing of property of the United States, this Court held in *United States* v. *San Francisco, supra*, 310 U. S. 16, 30, that the provisions made by Congress are controlling over State or municipal action because it

> "does not represent an exercise of a *general* control over public policy in a State but instead *only an exercise of the complete power which Congress has over particular public property intrusted to it*" (310 U. S. 30). (Italics ours.)

Ever since the adoption, under the Articles of Confederation, of the Land Ordinance of 1785, setting apart section 16 of every town for school purposes (e.g. *Cooper* v. *Roberts*, 18 How. (59 U. S.) 173, 177), Congress, in exercise of its plenary power, has sought to aid in the financing of local governments, such as towns and school districts.

When the Congressional grant is direct to the town, it does not pass to the State, and the State has no power over its disposal (*Jones* v. *Soulard*, 24 How. (65 U. S.) 41; *Kissell* v. *St. Louis Public Schools*, 18 How. (59 U. S.) 19).

Equally, here, when Congress provided that "The lessee's interest . . . shall be made subject to State *or local* taxation", the statute and contract are as much for the benefit of local communities as for benefit of the states, and a right, namely the right to tax the "lessee's interest", is given directly to the local governments as fully as it is given to the State. It is not qualified by a right of the State to defeat, either by action or by inaction, the right of a local government.

The corresponding and substituted provision of the recent statute (Public Law 1028, 84th Congress, c. 1041, of August 10, 1956, 70A Stat., p. 150, 10 U. S. C. A. § 2667 (e))

which repealed 34 U. S. C. A. § 522e "except with respect to rights and duties that matured . . . and proceedings that were begun, before the effective date of this act" (70A Stat., p. 641, § 53), is confirmatory of this. The new substituted provision, 10 U. S. C. A. § 2667 (e), provides:

> "The interest of a lessee of property leased under this section may be taxed by State *or local governments*." (Italics ours.)

It is "a familiar rule in the construction of statutes, that they must be so construed as to admit all parts of them to stand, if possible" (*Heydenfeldt* v. *Daney Gold and Silver Mining Co.*, 1877, 93 U. S. 634, 640). As there stated, so here, "The point made by the plaintiff would reject a part of these words, and defeat one of the main purposes in view".

It would reject the effectiveness of the words "or *local* taxation" in 34 U. S. C. A. § 522e, and the words "or *local* governments" in the substituted 10 U. S. C. A. § 2667. The latter section does not say that the lessee's interest may be taxed by local governments if and when the State shall thereafter so provide. Nor does the former say that the lessee's interest shall be made subject to its being made subject to local taxation if and when the State shall thereafter so provide. Both alike provide directly and unqualifiedly a right of "local taxation" or of taxation by "local governments", in the same phrase and manner as they provide a right of "State . . . taxation" or of taxation by "State . . . governments".

This direct grant by Congress to the local governments of the right of local taxation, with respect to a property interest being "made or created" and disposed of by Congress, is entirely proper, since, as said in *United States* v. *San Francisco*, *supra*, it "does not represent an exercise of a general control over public policy in a State but instead only an exercise of the complete power which Congress has

over particular public property intrusted to it" (310 U. S. 30).

The "public policy" involved is a public policy of the United States, in a field where the power of the United States is supreme and plenary, rather than a public policy of the State.

A different construction, moreover, in the language of *Heydenfeldt* v. *Daney Gold and Silver Mining Co., supra,* 93 U. S. 634, 640, would "defeat one of the main purposes in view"—or rather three main purposes of Congress—when Congress enacted § 522e. One principal purpose was the Federal purpose to aid local governments and school districts affected by Government ownership of property; a second purpose was the Federal purpose to prevent unfairness between the Government lessee and its competitors; and still a third purpose was the Federal purpose to reduce the amount the Federal Government otherwise would pay "in lieu of" taxes. Each of these three Federal purposes is defeated by the judgment herein.

It defeats also even the right of the *State* under the Act of Congress to assess the "lessee's interest". For the Court of Appeals majority does not hold that State officials may but the Town may not assess a tax on Grumman's interest. It holds rather that neither State officials nor the Town may assess any tax. Congress has said, and Grumman perforce has agreed, that either may. But the Court of Appeals majority holds that neither may.

The Court of Appeals, we submit, has misinterpreted and misapplied this Court's decision in *United States* v. *County of Allegheny,* 1944, 322 U. S. 174, as also did the dissenting Justice in the Appellate Division. The *County of Allegheny* case was decided May 1, 1944, when there was no Federal statute such as § 522e; and this Court said respecting judicial and Congressional powers:

> "The equities in this unfortunate conflict between the United States and one of its most important

> *industrial communities* are not capable of judicial ascertainment or equalization. . . . We can only say that our constitutional system as judicially interpreted from the beginning leaves no room for the *localities* to impose either compensatory or retaliatory taxation on Government property interests. *Their remedy lies in petition to the Federal Congress, which also is their Congress.*" (322 U. S. 190-191). (Italics ours).

Congress then enacted the Act of 1947 here involved: The present case being one wherein the lease was made *after Congress acted for benefit of local communities* by its enactment of § 522e, the *County of Allegheny* decision thus supports rather than denies the right of the Town to tax the lessee's interest herein, as now provided by "the Federal Congress, *which also is their Congress.*" And "policies so settled under federal authority may not be *defeated or limited* by state law" (322 U. S. 183).

This ruling in the *County of Allegheny* case was based on precisely the same Constitutional provisions relied on herein, viz., Art. 4, § 3, cl. 2; Art. 1, § 8, cl. 18, and Art. 6, cl. 2 of the United States Constitution (322 U. S. 182). The power of Congress being unlimited and plenary, "No State legislation can *interfere* with this right or *embarrass its exercise*" (*Gibson* v. *Chouteau*, 1871, 13 Wall. (80 U. S.) 92, 99.) (Italics ours).

These decisions do not hold that the State may not *aid* in carrying out the Federal program. Hence State legislation effective to *aid* in carrying out the Federal program may be given effect, as in *Offutt Housing Co.* v. *County of Sarpy, supra*, 351 U. S. 253. This is because, and to the extent that, the State laws which merely *aid* in carrying out the Federal program do not "*interfere* with this right or *embarrass its exercise*" (80 U. S. 99) and do not cause the Federal program to be "*defeated or limited* by state law" (322 U. S. 183). But the majority opinion of the Court of Appeals herein would have the Federal program "defeated

or limited" by preexisting State law not enacted with respect thereto but which the majority holds, in effect, does so "interfere with" or 'embarrass the exercise' of the unlimited and plenary power of Congress as to prevent Grumman's interest being subject to local taxation as provided by Congress.

The State Court's majority opinion does this, moreover, by expressly relying upon a supposed rule requiring strict construction against the Town and in favor of Grumman of any applicable laws.*

But this Court has repeatedly held that where a Federal statute (the Miller Act) required those *contracting with the Government* to furnish a bond securing payment to all persons supplying labor or materials, both "the act and the bonds given under it must be construed liberally for the protection of those" intended to be benefited (*Brogan* v. *National Surety Co.*, 1918, 246 U. S. 257, 262), and "should be liberally construed in aid of the evident public object" (*Standard Accident Insurance Co.* v. *United States*, 1938, 302 U. S. 442, 444; *MacEvoy* v. *United States*, 1944, 322 U. S. 102, 105). The Act is "highly remedial and must be construed liberally" (*Fleischmann Co.* v. *United States*, 1926, 270 U. S. 349, 360). "The rule of *strictissimi juris* is a stringent one, and is liable at times to work practical injustice" (*Guaranty Co.* v. *Pressed Rock Co.*, 1903, 191 U. S. 416, 426).

---

* For such rule it relies on *Gould* v. *Gould*, 1917, 245 U. S. 151 (alimony wrongly assessed as income); *American Locker Co.* v. *City of New York*, 1955, 308 N. Y. 264 (receipts from coin operated storage lockers wrongly assessed as sales of tangible personal property); and *Matter of Good Humor Corp.* v. *McGoldrick*, 1943, 289 N. Y. 452 (chocolate coated ice cream assessed as "candy and confectionery" but excluded as "milk and milk products"). Each involved a mere private citizen contesting a tax. None involved, as here, a Federal contract "made subject to State or local taxation" by mandate of Congress, as part of a Federal program to benefit the local communities.

In *McCarthy* v. *Mann*, 1873, 19 Wall. (86 U. S.) 20, 32, where Congress exercised its power under Art. 4, § 3, cl. 2, of the Constitution, to grant a patent to a former land claimant to "enure to the benefit of his grantees as far as he may have conveyed the same", and a later grantee of a former grantee also claimed title against the same person's prior grantees, the Court said:

> "The law is explicit and there is no difficulty in carrying out its provisions. It must be liberally construed to effect the purposes of its enactment" (86 U. S. 32).

Here, Grumman is not a mere taxpayer or citizen. It is one who has made a contract with the Federal Government. It has been granted a two-fold interest in Government property under an Act of Congress expressly providing that such interest be subject to "local taxation,". Nor is the Town merely a government assessing a tax against a citizen. The Town is as fully beneficiary of a Federal statute and Federal contract as were those supplying labor or materials under the Miller Act above mentioned or those claiming as Poncin's grantees in *McCarthy* v. *Mann, supra*. The Town, therefore, is entitled to a liberal construction in its favor rather than Grumman being entitled to a strict construction against the Town.

This rule of liberal construction has been applied, indeed, under earlier Federal statutes giving mere "consent of the United States" for taxation "under the authority of the laws of" a State of "structures and other property in private ownership" on a Federal reservation (*Ex parte Gaines*, 1892, 56 Ark. 227; *Superior Bath House Co.* v. *McCarroll*, 1941, 312 U. S. 176, 179; *Buckstaff Bath House Co.* v. *McKinley*, 1939, 308 U. S. 358, 363-364). In *Superior Bath House Co.* v. *McCarroll*, this Court said:

> "By these provisions Congress manifested its purpose that no type of privately owned property should escape the state's taxing power merely because it was owned or used on the reservation." (312 U. S. 179).

The Court noted that although structures attached to land

a Congressional provision that they be taxed as personal property controlled (312 U. S. 179).

Here, Congress has not mandated that the "lessee's interest" be taxed as personal property; nor has the State legislature; and we submit that the State judiciary may not do so as a means of defeating any local taxation. The attention of Congress clearly was directed to the real estate taxes the local communities were losing because of Government exemption. It provided for payment of part of this by the lessee as a local tax on the "lessee's interest", effectively severed for this purpose by Congress itself; and it provided by separate legislation that the remaining part be paid by the Government "in lieu of" a tax on the Government's ownership interest.

In *United States* v. *County of Allegheny, supra*, 322 U. S. 174, 184, this Court held that:

> "Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted."

Mr. Justice Frankfurter's dissenting opinion also stated that:

> "We are all agreed that a State must subordinate its policies to the constitutional powers duly exercised by the United States" (322 U. S. 195).

In *S. R. A.* v. *Minnesota, supra*, 327 U. S. 558, the Court rejected a "too mechanical" rule (327 U. S. 569); and also held that the meaning and effect of contracts to which the United States is a party "must be finally determined by this Court" (327 U. S. 564).

In *United States* v. *County of Allegheny, supra*, 322 U. S. 174, 183, this Court held that, in such cases, "we do not think the state law would be decisive of the question of title" (322 U. S. 182), and that:

> "The purpose of the supremacy clause was to avoid

> flicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state" (322 U. S. 183).

Hence, "policies so settled under federal authority may not be defeated or limited by state law" (322 U. S. 183).

There is a "long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest" (*Kern-Limerick Inc.* v. *Scurlock*, 1954, 347 U. S. 110, 121, and cases cited in footnote 11). As said in *Case* v. *Bowles*, 1946, 327 U. S. 92, 102:

> "Congress has power in order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—to use all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution. . . .
>
> Where, as here, Congress has enacted legislation authorized by its granted powers, and where at the same time, a state has a conflicting law which but for the Congressional Act would be valid, the Constitution marks the course for courts to follow. Article VI provides that 'The Constitution and the Laws of the United States . . . made in Pursuance thereof . . . shall be the supreme Law of the Land' " (327 U. S. 102-103).

The power of Congress in order to attain the legitimate end and accomplish the full purpose of affording aid to local governments, by making and severing from Government property a "lessee's interest" with option to buy, and making it subject in private hands to local taxation, includes, of course, the power to use as appropriate means to that end the existing local governments and their boards of assessors, as well as any State law or procedure which may be adopted

part of the Congressional program and are to be liberally construed to accomplish the full purpose of Congress and to prevent rather than occasion its defeat.

If § 3 and § 4 of the New York Tax Law (Appendix, infra, pp. 27, 28) be read as either containing or as supplemented by 34 U. S. C. A. § 522e, every argument of Grumman or of the Court of Appeals majority is dissipated. After Congress exercised its plenary power under Art. 4, § 3, cl. 2 and Art. 1, § 8, cl. 18 of the Constitution by enacting 34 U. S. C. A. § 522e, even the State legislature could not nullify this by providing, for example, that the "lessee's interest" made or created under the Act of Congress shall "*not*" be subject to State or local taxation. There is, however, no such nullifying State legislation. The Court of Appeals majority decision itself introduces the nullifying "disparities, confusions and conflicts" (322 U. S. 183) which it was the purpose of the supremacy clause to avoid. The Court of Appeals majority decision, by its unwarranted strict and extraordinary construction of preexisting State Law, defeats the power of Congress "to accomplish the full purpose of a granted authority" (327 U. S. 102), where even the State legislature would have no power to do so.

While petitions to this Court in tax cases are usually by taxpayers, this Court also reviews tax cases on petition of a State (*Alabama* v. *King & Boozer*, 1941, 314 U. S. 1) or municipal corporation (*City of New Brunswick* v. *United States*, 1928, 276 U. S. 547).

CONCLUSION

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted,

REGINALD C. SMITH,
Counsel for Petitioners.

CHARLES A. ELLIS,

APPENDIX

APPENDIX

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES:

Art. 4, § 3, cl. 2:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; . . ."

Art. 1, § 8, cl. 18:

> "The Congress shall have Power . . .
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Art. 6, cl. 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

ACT OF AUGUST 5, 1947, c. 493, § 1, 61 Stat. 774, amended September 28, 1951, c. 434, Title VI, § 605, 65 Stat. 366, 34 U. S. C. A. § 522a; and § 6, 61 stat. 775, 34 U. S. C. A. 522e:

> "§ 522a. Lease of real or personal property; period of lease; terms and conditions; revocation; disposition of receipts; report to Congress.
>
> Whenever the Secretary of the Navy shall deem it to be advantageous to the Government he is authorized to lease such real or personal property under the

control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 756) and is not for the time required for public use, to such lessee or lessees and upon such terms and conditions as in his judgment will promote the national defense or will be in the public interest. Each such lease shall be for a period not exceeding five years unless the Secretary shall determine that a longer period will promote the national defense or will be in the public interest. The Secretary may include, among other terms and conditions in the lease, a right of first refusal in the lessee to purchase the property in the event of the revocation of the lease in order to permit sale thereof by the Government, but this section shall not be construed as authorizing the sale of any property unless the sale thereof is otherwise authorized by law. Each such lease shall contain a provision permitting the Secretary to revoke the lease at any time, unless the Secretary shall determine that the omission of such provision from the lease will promote the national defense or will be in the public interest. In any event each such lease shall be revocable by the Secretary during a national emergency declared by the President. Notwithstanding section 303b of title 40, or any other provision of law, any such lease may provide for the maintenance, protection, repair, or restoration by the lessee, of the property leased or of the entire unit or installation where a substantial part thereof is leased, as a part or all of the consideration for the lease of such property. In the event utilities or services shall be furnished by the Department to the lessee in connection with any lease, payments for utilities or services so furnished may be covered into the Treasury to the credit of the appropriation or appropriations from which the costs of furnishing any such utilities or services to the lessee was paid. Except as otherwise hereinabove provided, any money rentals received by the Government directly under any such lease shall be deposited and covered into the Treasury as miscellaneous receipts. The authority herein granted shall not apply to oil, mineral, or phosphate lands."

"§ 522e. Lease of real or personal property; State or local taxation; renegotiation of leases

The lessee's interest, made or created pursuant to the provisions of sections 522a-522e and 522e of this title, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of said sections shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

NEW YORK TAX LAW, § 3, and § 4, pars. 1 and 17; 59 McKinney's Consolidated Laws of New York, Part 1, § 3 and § 4, pars. 1 and 17:

"§ 3. Property liable to taxation

All real property within the state is taxable unless exempt from taxation by law. Notwithstanding any provision of any other law, property used or occupied by a railroad for purposes of railroad operation, title to which is in the state of New York or in any municipal corporation thereof under any of the grade crossing elimination acts, shall be deemed property of the railroad for purposes of taxation and shall be assessed and taxed in the same manner and to the same extent as if such railroad were the owner thereof. Notwithstanding any provision of this chapter, or of any other general, special or local law to the contrary, personal property, whether tangible or intangible, shall not be liable to taxation locally for state or local purposes. As used in this section, the term 'personal property,' in its application to the property of corporations taxable under article nine-a of this chapter, shall include any movable machinery and equipment used for trade or manufacture and not essential for the support of the building, structure or superstructure, and removable without material injury thereto and shall not include boilers, ventilating apparatus, elevators, plumbing, heating, lighting and power generating apparatus, shafting other than

counter-shafting, equipment for the distribution of heat, light, power, gases and liquids, nor any equipment consisting of structures or erections to the operation of which machinery is not essential. An owner of a building is entitled to the same exemption under this section as a lessee. As amended L. 1933, c. 470, § 1; L. 1944, c. 415, § 7; L. 1945, c. 278, eff. March 27, 1945."

"§ 4. Exemption from taxation

The following property shall be exempt from taxation:

1. Property of the United States except property subject to taxation under the constitution and laws of the United States.

• • •

17. Whenever the legal title of real property is in the United States or in this state, but the use, occupation or possession thereof is in a corporation, association, co-partnership or individual, or its or his successor in interest, under a contract of sale or other agreement whereby upon certain payment or payments the legal title is to be or may be acquired by such corporation, association, co-partnership or individual, his or its interest in such real property shall be assessed and taxed as real property subject to the provisions of this subdivision. The interest of the United States, or of this state, in such property shall not be assessed or taxed and the assessing and taxing officers shall add to the assessment and tax rolls opposite the description of any such property a notation stating that such interest is not assessed or taxed; and every notice of sale or other process and every conveyance or other instrument affecting the title to any such property, consequent upon the nonpayment of any such tax, shall contain a statement that such interest is not sold or to be sold or affected. The interest in any such property of the corporation, association, co-partnership or individual, which or who is in the use, occupation or possession thereof, shall be assessed and taxed in the same manner as if

said corporation, association, co-partnership or individual held the legal title to such property, except for the addition to the description of the words 'interest under contract,' or other appropriate words descriptive of the interest in the property so assessed. Such assessment shall be at the full value of such property without deduction therefrom on account of the whole or any part of the purchase price, or other sum due on such property, remaining unpaid. The classification of such property or any part thereof as real property for the purposes of taxation under this chapter shall not be affected by any provision of the contract or agreement under which the same is held."

Decision—Opinion of Hogan, J.

Dated December 7, 1955

SUPREME COURT

SUFFOLK COUNTY

[SAME TITLE]

Petitioner has instituted a proceeding under Article 13 of the Tax Law to review and strike from the rolls the assessments made against it on the 1955-56 assessment roll of the Town of Riverhead, covering its alleged interest in certain real property lying in said Town, owned by the United States but occupied by petitioner under a lease. Upon the return of said petition, the respondent moved that it be dismissed upon the ground that it failed to state facts sufficient to warrant such relief.

It is the petitioner's contention that it has absolutely no assessable or taxable interest whatsoever in the property involved. The Court is called upon to determine whether the "Supplemental Facilities Agreement" between the petitioner and the United States of America brings it within the operation of Section 4, Subdivision 17 of the Tax Law of the State of New York, which statute directs the taxation of the interest of a corporation in real property held under an agreement, "* * * whereby upon certain payment or payments, the legal title is to be or may be acquired by such corporation * * *".

The Supplemental Facilities Agreement was entered into on August 26, 1954, under the authority of Title 34, Section 522 (a) of the United States Code. In form it is a lease of certain land and improvements owned by the Government, lying in the Towns of Riverhead and Brookhaven, and constituting the Naval Industrial Reserve Aircraft Plant; D. O. D. No. 466.

Article X thereof is entitled "Improvements, Mobilization and Option to Purchase" and reads as follows:

> "ARTICLE X—IMPROVEMENTS, MOBILIZATION AND OPTION TO PURCHASE.
>
> "(a) In the event that the Facilities are determined to be excess to the further needs and responsibilities of the Department, and the Department elects to terminate this lease in accordance with the provisions of paragraph (d) of Article VII hereof, the Lessee shall have an option, which may be exercised by notice of intention to purchase delivered to the Department at any time during a period of ninety (90) days after receipt of notice of termination, to purchase the Facilities at their original cost to the Government less depreciation on improvements (exclusive of improvements financed by Lessee) at the rate of 3% per annum from the date of completion of the Facilities to the date notice of Lessee's intention to exercise such option is received by the Government. Sale of the facilities to the Lessee shall, however, be subject to the Department obtaining all necessary authorizations and approvals required to enable it to sell the Facilities to the Lessee.
>
> "(b) In the event Lessee purchases the Facilities in accordance with paragraph (a) hereof, the Lessee hereby covenants and agrees that, for a period of twenty (20) years from the date of the deed which effects a transfer of said Facilities to the Lessee, it will maintain said Facilities in such condition that they will at all times be capable of producing military aircraft for the department within thirty (30) days after receipt by Lessee of a mobilization notice from the Department; and Lessee further agrees that such covenant may, at the option of the Department, be made a part of the deed of conveyance from the Government.
>
> "(c) The Lessee hereby covenants and agrees that, subject to and in accordance with the provisions of Article XI hereof, it will, within five (5) years from the date hereof, expend not less than $1,000,000

> for the construction of additional buildings, structures or other improvements to the Facilities. In the event that this lease is terminated by either party prior to the expiration of the first five year term hereof, then the provisions of this paragraph (c) shall be of no force and effect; *provided, however*, that if this lease is terminated during the first term hereof and the Facilities are sold to the Lessee in accordance with the provisions of paragraph (a) of this Article and Lessee at the date of the sale has not expended $1,000,000 for the construction of additional buildings, structures or other improvements to the Facilities, then the deed of conveyance to Grumman Aircraft Engineering Corporation shall contain a covenant on the part of Grumman Aircraft Engineering Corporation to carry out the provisions of this paragraph (c).

It should be noted that the lessee is not granted an absolute option, but merely a right of first refusal when *and if* the Government elects to terminate the lease, and when and if the Navy Department obtains all necessary authorizations and approvals. These "necessary authorizations and approvals" have been described to the Court by petitioner's counsel as follows:

> "* * * when a department that has jurisdiction of the property finds out that it is excess to its needs, it is then circulated amongst other departments of the government to see whether they have any use for it, and if none of them has any use for it, it then goes to the General Services Administration, which may dispose of it and usually disposes of it by referring it back to the department which had original jurisdiction and allows them to dispose of it."

What the petitioner has, therefore, is simply a lease with a right of first refusal in the event that the landlord elects to, and can sell the leased premises.

The Congress of the United States has permitted State and local governments to tax such leases by enacting, in

1947, Section 522e, Title 34, of the United States Code, which provides that:

> § 522 (e) Lease of Real or Personal Property: State or Local Taxation: Renegotiation of Leases.
>
> "The lessee's interest, made or created pursuant to the provisions of sections 522a—522c and 522e of this title, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of said sections shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

In those states which permit the taxation of personal property, such a lease, as well as the conditional option, could be assessed and taxed without further ado. In New York, on the other hand, it is provided that "* * * personal property, whether tangible or intangible, shall not be liable to taxation locally for State or local purposes." (Tax Law, Sec. 3)

It is fundamental, however, that the Legislature may classify property for tax purposes in any manner it deems proper (Peo. ex rel. Holmes Electric Protective Service Co. v. Chambers, 125 N. Y. S. (2d) 436). Has it classified the interest of this petitioner arising under the Supplemental Facilities Agreement in such manner as to make it taxable? Such classification, if in fact it has been made, must be found in the aforesaid Section 4, subd. 17 of the Tax Law. This subdivision was enacted in 1925, twenty-two years *prior* to the partial relinquishment by the United States of its sovereign right to exemption from State and Local taxation (U. S. C. Title 34, Sec. 522 (e), supra). Its pertinent provisions read as follows:

> "Whenever the legal title of real property is in the United States * * *, but the use, occupation or

> possession thereof is in a corporation * * * or its * * * successor in interest, under a contract of sale or other agreement whereby upon certain payment or payments, the legal title is to be or may be acquired by such corporation * * *, its interest in such real property shall be assessed and taxed as real property subject to the provisions of this subdivision * * *. The interest in any such property of the corporation * * * which * * * is in the use, occupation or possession thereof, shall be assessed and taxed in the same manner as if said corporation * * * held the legal title to such property, except for the addition to the description of the words, descriptive of the interest in the property so assessed. *Such assessment shall be at the full value of such property without deduction therefrom on account of the whole or any part of the purchase price, or other sum due on such property, remaining unpaid* * * *".

Was the Statute designed to make taxable an interest such as this petitioner's or was it intended only to reach a *vendee in possession* under an executory agreement of sale, one who was the equitable owner of the premises but who would not receive legal title until a final payment had been made?

It is to be interpreted in the light of the principle that "A statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax." (Good Humor Corp. v. McGoldrick, 289 N. Y. 452, 455; See also RKO-Keith-Orpheum Theatres, Inc. v. City of New York, 285 App. Div. 374), and Chief Justice Conway of the Court of Appeals said, in the case of American Locker Co. v. City of New York, 308 N. Y. 264:

> "Moreover, it was well said in Gould v. Gould (245 U. S. 151, 153): 'In the interpretation of stat-

> utes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen. United States v. Wigglesworth, 2 Story, 369; American Net & Twine Co. v. Worthington, 141 U. S. 468, 474; Benziger v. United States, 192 U. S. 38, 55". (See, also, Matter of Holmes Elec. Protective Co. v. McGoldrick, 262 App. Div. 514, affd. 288 N. Y. 635; Matter of Brooklyn Union Gas Co. v. McGoldrick, 270 App. Div. 186, 195, affd. 298 N. Y. 536; Matter of Good Humor Corp. v. McGoldrick, 289 N. Y. 452)"

The mandate of the Statute is that the assessment shall be at the *full value of the property*, without deduction for the unpaid portion of the purchase price. Such language hardly indicates an intent to confer upon a local taxing authority the power to impose upon a lessee under a five year tenure, terminable at the will of the landlord, a tax *based upon the full value of the leased property*, merely because the lease contains a right of first refusal when and if the landlord decides to sell. The Act does not provide for an assessment at the value of the lessee's interest in the property, but for an assessment "at the full value" of *the property itself*.

Even if there were a reasonable doubt as to the effect of this language, it would have to be construed in favor of the taxpayer (Dun & Bradstreet v. City of New York, 276 N. Y. 198, 204).

The respondent has offered several decisions which, it claims, support its position. In S. R. A., Inc. v. Minnesota, 327 U. S. 558, the corporation was occupying the premises sought to be taxed under an *executory contract of sale*, under which it had obtained an equitable interest which would indefeasibly ripen into legal title when and if it

completed the payments on account of the purchase price. Instead of passing title subject to a purchase money mortgage, the vendor (the United States) permitted the vendee to occupy the premises, but retained title until payments were completed. It was held that the State of Minnesota could tax the vendee's equitable interest, so long as the right of the United States to repossess upon default remained paramount. The case at bar is clearly distinguishable by reason of the fact that this petitioner has no equitable ownership, nor even an absolute right to acquire ownership—under an agreement of sale, but merely a right of first refusal *if* the owner should decide to sell.

In U. S. v. Woodworth, 66 Federal Supp. 641, it was held that Government owned property (in the State of New York to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds as a bailee. The Court added the following statement by way of dictum:

> "The City and County did not undertake to levy taxes upon the interests of Eastman Kodak Company and Bausch & Lomb Optical Company (leases with conditional options to purchase from the United States) as they might possibly have done under Section 4, subdivision 17 of the tax law, if the interests of said corporations, as defendants contend, amounted to an interest 'under a contract of sale or other agreement whereby upon certain payment or payments, the legal title is to be or may be acquired by such corporation * * *'."

This is far from holding that such interests were, in fact, taxable.

In Dayton Development Fort Hamilton Corp. v. Boyland, 133 N. Y. S. (2d) 831, decided by Mr. Justice Ughetta, the United States leased real property in the City of New York to petitioners for a term of 75 years for the purpose of

erecting housing units thereon. The lease further provided that title to all improvements constructed upon the premises by the lessees should remain in them, and that they might elect to remove such improvements upon the termination of the lease. These two circumstances, i.e., the 75 year term and the retention of title to improvements apparently formed the basis for the imposition of a real estate tax. The petitioner in the case at bar has no title of any nature to the improvements.

In People ex rel. Mergenthaler v. Mills, not reported, but affirmed 281 App. Div. 167, Mr. Justice Ughetta held that where the petitioner leased real property from the Defense Plant Corporation, one of the terms of the lease being that the lessee agreed to pay all taxes on it or upon the Defense Plant Corporation, and another being that the lessee could include the amount so paid in the price it charged the United States for its height finders, and where, concededly, the Defense Plant Corporation was not vested with tax exemption, the fact that the United States, through delay or administrative oversight, failed to convey legal title to the Defense Plant Corporation for the first years of the lease, was no ground for exempting the petitioner from local taxation. To base exemption on such a mere technicality, he said, would be to exault form over substance.

Alabama v. King & Boozer, 314 U. S. 1, is authority only for the principle that when one contracts to sell or to manufacture for the United States Government on a "cost-plus" basis, the fact that any tax imposed upon the contractor will be paid indirectly by the United States, is no ground for exempting the contractor from taxation.

The Legislature may, if it sees fit, make this type of leasehold subject to local taxation at its fair value. The impact of a large operation such as this petitioner's, accompanied by an influx of hundreds of workers and their

families, can result in great and sudden hardship to an established community or school district. But until the Legislature does so in plain and unequivocal language, the Court is constrained to apply the aforesaid statutory rules of construction to existing legislation, and to find that the tax sought to be imposed is unauthorized. Respondent's motion to dismiss the petition under Article 13 of the Tax Law accordingly, is denied. The petition is sustained and respondent will be directed to remove from its tax rolls, the assessments set forth therein.

HOWARD T. HOGAN
J. S. C.

Opinion of Reversal

[Same Title]

In a proceeding under article 13 of the Tax Law to review tax assessments, the appeal is from an order denying a motion to dismiss the petition for insufficiency, finding that the assessments are illegal, and directing appellants and all tax officials having jurisdiction thereof to strike the assessment from the assessment roll for the year 1955-1956. Title to the property was in the United States. Appellants based the assessment upon subdivision 17 of section 4 of the Tax Law which provides that where legal title to real property is in the United States, a tax assessment may be levied against the interest of an occupant or possessor thereof under an agreement whereby upon certain payment or payments legal title may be acquired by the occupant. The respondent was in possession under a lease containing an option to buy at a certain price in the event that the lessor, pursuant to other provisions of the lease, elected to terminate the lease and dispose of the property as surplus. The order appealed from is based upon the determination that the statute involved applies only to a holder of equitable title in possession of property. Order reversed, without costs, and motion granted. The statute applies to an occupant in possession under any agreement whereby he may, upon certain payments, acquire legal title. The leasehold interest, including the option to buy at a certain price and under certain conditions, is a taxable interest under the statute. Beldock, Murphy, Ughetta and Kleinfeld, JJ., concur. Wenzel, Acting P.J., dissents and votes to affirm with the following memorandum: Real property owned by the United States and in possession of a vendee under an executory contract of sale is taxable as real property. (Tax Law, sec. 4, subdiv. 17; 68 N. Y. St. Dept. Rep. 425; S. R. A., Inc. v. Minnesota, 327 U. S. 558). The ownership by the

United States would not bar local taxation of respondent's interest if the New York statutes made any provision for taxing such interest (U. S. Code, tit. 34, sec. 522e). Inter alia, the lease authorized the lessor to terminate the lease at any time during a declared national emergency or on ninety days' notice by the Secretary of the Navy whenever he determines that the interests of national defense so require. No title to the real property, legal or equitable, was in the respondent. It did not own the buildings nor did it have the right to remove them. The United States did not hold merely a naked legal title and a nominal interest (see e. g., United States v. Allegheny County, 322 U. S. 174, 187). Such interest as the respondent had was not taxable as real property (People ex rel. Int. Navigation Co. v. Barker, 153 N. Y. 98; People ex rel. Hudson River Day Line v. Franck, 257 N. Y. 69; 1949 Atty. Gen. 90; cf. People ex rel. Muller v. Board of Assessors, 93 N. Y. 308, and Dayton Development Ft. Hamilton Corp. v. Boyland, 133 N. Y. S. 2d, 831, aff'd — App. Div. 2d, —, Second Dept., decided April 30, 1956; see e. g., Matter of Althause, 63 App. Div. 252, aff'd 168 N. Y., 670).

Opinions in New York Court of Appeals

Decided March 8, 1957.

COURT OF APPEALS

STATE OF NEW YORK

[SAME TITLE]

DYE, J. The Grumman Aircraft Engineering Corporation, hereinafter called Grumman, instituted this special proceeding under article 13 of the Tax Law against the Assessors of the Town of Riverhead, Suffolk County, New York, hereinafter called Assessors, for an order striking from its assessment rolls an assessment made against Grumman's alleged interest in real property lying in said town and leased by it from the United States, hereinafter called Government, on the ground that such leasehold interest is not subject to assessment and tax within the provisions of the State Tax Law. Grumman now appeals as of right from an order of the Appellate Division, Second Department, which reversed an order of the Supreme Court, Suffolk County, denying respondents' motion to dismiss Grumman's petition for insufficiency, and dismissed the petition.

Under date of January 23, 1952, Grumman made a contract with the Government known as Facilities Contract N60a-1151, which, in brief, dealt with the acquisition of machine equipment and tools and the design, layout and construction of what is now known as the Naval Industrial Reserve Aircraft Plant at Calverton, Suffolk County, New York. This was under the direction of the Secretary of the Navy. The construction work cost the Government about $23,500,000. In addition, Grumman contributed engineering, design and supervisory work amounting to $2,356,112 or a total cost of $25,856,112 for the completed facility.

Upon completion of the work, the Government leased the whole facility to Grumman by written lease dated April 1

1954 for a term of five years ending March 31, 1959, with the right of renewal on the same terms at the option of the tenant for two successive five-year periods, the rental, however, for the latter periods being subject to renegotiation prior to the commencement of such renewal or extended term. Various other terms and conditions are dealt with which need not be mentioned except to call attention to the lease provision dealing with termination before the end of the term when and if the Secretary determines the facilities or a major portion thereof are excess to the further needs of the Navy Department (art. VII, par. [d])[1] and, if so terminated, the tenant's option to purchase (art. X, par. [a])[2].

---

[1] "Upon ninety (90) days written notice to the Lessee that Secretary has determined that the Facilities, or the major portion thereof, are excess to the further needs and responsibilities of the Department: *provided, however*, that if, within such ninety (90) day period, the Lessee shall notify the Department of its intention to exercise the right to purchase the Facilities as provided in Article X hereof, termination of this lease pursuant to this paragraph (d) shall not become effective unless and until the Department shall have obtained all necessary authorizations and approvals required to effectuate such sale to the Lessee and shall have notified Lessee that it has obtained such necessary authorizations and approvals."

[2] "(a) In the event that the Facilities are determined to be excess to the further needs and responsibilities of the Department, and the Department elects to terminate this lease in accordance with the provisions of paragraph (d) of Article VII hereof, the Lessee shall have an option, which may be exercised by notice of intention, to purchase delivered to the Department at any time during a period of ninety (90) days after receipt of notice of termination, to purchase the Facilities at their original cost to the Government less depreciation on improvements (exclusive of improvements financed by Lessee) at the rate of 3% per annum from the date of completion of the Facilities to the date notice of Lessee's intention to exercise such option is received by the Government. Sale of the facilities to the Lessee shall, however, be subject to the Department obtaining all necessary authorizations and approvals required to enable it to sell the Facilities to the Lessee."

The assessments complained of were levied pursuant to provisions of subdivision 17 of section 4 of the Tax Law[3] and in reliance on a waiver of immunity as contained in Federal Statute (U. S. Code, tit. 34, §§ 522a, 522c, 522e)[4] as follows:

---

[3] Insofar as pertinent, subdivision 17 of section 4 of the Tax Law provides:

"17. Whenever the legal title of real property is in the United States or in this state, but the use, occupation or possession thereof is in a corporation, association, co-partnership or individual, or its or his successor in interest, *under a contract of sale or other agreement whereby upon certain payment or payments the legal title is to be or may be acquired by such corporation, association, co-partnership or individual*, his or its interest in such real property shall be assessed and taxed as real property subject to the provisions of this subdivision. The interest of the United States, or of this state, in such property shall not be assessed or taxed * * *. The interest in any such property of the corporation * * * shall be assessed and taxed in the same manner as if said corporation * * * held the legal title to such property, except for the addition to the description of the words 'interest under contract,' or other appropriate words descriptive of the interest in the property so assessed. Such assessment shall be at the full value of such property without deduction therefrom on account of the whole or any part of the purchase price, or other sum due on such property, remaining unpaid. The classification of such property or any part thereof as real property for the purposes of taxation under this chapter shall not be affected by any provision of the contract or agreement under which the same is held." (Emphasis supplied. This section was formerly § 24, as added by L. 1925, ch. 99, and was renum. 17 by L. 1933, ch. 470, eff. June 30, 1933. Former subd. 17 was repealed by L. 1933, ch. 470, § 9, and was derived from Tax Law of 1896, L. 1896, ch. 908, § 4.)

[4] "§ 522e. Lease of real or personal property; State or local taxation; renegotiation of leases.

"The lessee's interest, made or created pursuant to the provisions of sections 522a-522c and 522e of this title, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of said sections shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms

(Footnote continued on next page).

1955-1956	$ 743,100
For amount omitted from 1954 tax roll	496,000
TOTAL	$1,239,100[5]

The petitioner-appellant challenges the validity of such assessments (1) for lack of statutory authority; (2) if deemed authorized by subdivision 17 of section 4 of the Tax Law, then such statute is constitutionally invalid as viola-

---

of such lease shall be renegotiated." (Aug. 5, 1947, ch. 493, § 6, 61 U. S. Stat. 775. Repealed by Act Aug. 10, 1956, ch. 1041, § 53, 70A U. S. Stat. 611, 677, U. S. Code, tit. 10, Armed Forces, § 2667. Substantially re-enacted with changes appropriate to the various departments of the armed forces as U. S. Code, tit. 10, Armed Forces, § 2667.) Subdivision (e) thereof provides:

"(e) The interest of a lessee of property leased under this section may be taxed by State or local governments. A lease under this section shall provide that, if and to the extent that the leased property is later made taxable by State or local governments under an act of Congress, the lease shall be renegotiated."

[5] The method of evaluation apparently employed to reach the 1955-1956 amount of $743,100 is described in Exhibit B as follows:

"1. Loss by petitioner on acreage sold to the U. S. Govt.	1,052.00
2. Cost of engineering survey made at petitioner's expense prior to contract with U. S. Government for establishment of Facilities	5,060.00
3. 10% of the cost of constructing improvements on Government property at Government expense on the theory that petitioner contributed services worth 10% in supervising the several contracts involved	2,350,000.00
Total	$2,356,112.00
With a deduction for property in another town, and 'equalizing' the assessment at 33⅓, the total assessed value for the Town of Riverhead is	$ 743,100.00"

tive of the immunity of the Federal Government from taxation by the States (*United States* v. *County of Allegheny*, 322 U. S. 174); and (3) that, in any event, the petition should not have been dismissed but, instead, remanded to the Supreme Court, Suffolk County, for further proceedings.

The Special Term sustained the petitioner's objections and granted an order directing the Assessors to remove the assessment from its tax rolls. This ruling was on the theory that Grumman's interest in the facilities, at best, was personalty, and—as such—not liable to assessment and tax as real property (Tax Law, § 3). Upon appeal, the Appellate Division took a contrary view, reversed the order and dismissed the petition on the ground that Grumman's interest was taxable within the meaning of subdivision 17 of section 4 of the Tax Law.

Initially let it be said that Grumman does not assert that it is exempt from taxation. Its assertion is that it has no interest in the subject premises, otherwise immune from taxation, which can be said to fall within the purview of any tax statute.

In New York, all real property within the State is taxable unless specially exempt by law (Tax Law, § 3). Property of the United States is exempt unless made subject to taxation under the Constitution and laws of the United States (Tax Law, § 4, subd. 1). On the other hand, personal property—whether tangible or intangible—is not liable to taxation locally for State or local purposes (Tax Law, § 3). Although it is fundamental that the Legislature may classify property for tax purposes in any manner it deems proper (*People ex rel. Hudson Riv. Day Line* v. *Franck*, 257 N. Y. 69), its power in that regard is not without limitation, for the classification must have some reasonable basis (*People ex rel. Farrington* v. *Mensching*, 187 N. Y. 8). It is significant to note that nowhere in the Tax Law has the Legislature characterized a leasehold as tax-

able real property. Such omission is understandable, as a lease for years is deemed personalty (*Matter of Althause*, 63 App. Div. 252, affd. without opinion 168 N. Y. 670; *Fifth Ave. Bldg. Co. v. Kernochan*, 221 N. Y. 370; *First Trust & Deposit Co. v. Sprdelco, Inc.*, 249 App. Div. 285; *Matter of Ehrsam v. City of Utica*, 37 App. Div. 272; Restatement, Property, § 8; 1949 Atty. Gen. 90, 91). We do not read subdivision 17 of section 4 of the Tax Law as changing this basic concept.

Subdivision 17 of section 4 of the Tax Law was enacted following our decision in *People ex rel. Donner-Union Coke Corp. v. Burke* (204 App. Div. 557, affd. without opinion 236 N. Y. 650). In that case, the Donner Company was in possession of the plant which it had purchased from the United States Government under an executory contract of sale, the Government retaining the legal title as security analogous to a mortgage. We struck down an assessment against Donner on the theory that, to apply the principle that a vendee in possession of real property under an executory contract of sale is to be regarded as the owner for purposes of taxation, might cause embarrassment to the title of the United States in the event of a tax sale. It was the illegality of such assessment which the Legislature sought to cure by enacting subdivision 17 of section 4 (see *People ex rel. Donner-Hanna Coke Corp. v. Burke*, 248 N. Y. 507).

Grumman is not in the same position as Donner. It is not in possession under an executory contract of purchase as was Donner, but is in possession under a long-term lease which casts the parties in the relationship of landlord and tenant. Under the lease, the Government retains legal title, not as an equitable mortgagee, but as an owner in fee—together with all rights of ownership—including the right to terminate the lease at will. Nothing in the lease is tantamount to an equitable ownership such as is contemplated by the statute. According to the lease, Grumman has no

more than an option "to purchase the Facilities at their original cost to the Government less depreciation" (art. X, subd. [a]—for full text, see Note 2 above, p. 504) which, however, may not be exercised until after 90 days' written notice to the lessee that "the Secretary has determined that the Facilities, or the major portion thereof, are excess to the further needs and responsibilities of the Department: *provided, however*, that if, within such ninety (90) day period, the Lessee shall notify the Department of its intention to exercise the right to purchase the Facilities as provided in Article X hereof, termination of this lease * * * shall not become effective unless and until the Department shall have obtained all necessary authorizations and approvals required to effectuate such sale * * * and shall have notified Lessee that it has obtained such necessary authorizations and approvals" (art. VII; for full text see Note 1 above, p. 504).

When this so-called option is read in its most favorable light, it confers upon the lessee nothing more than a right of first refusal to purchase the facilities at a price to be fixed at the time and conditioned upon a variety of circumstances that only affirmative action of the secretary can bring to pass—and even then—it is subject at all times to the secretary's having obtained "all necessary authorizations or approvals". Until these prerequisite conditions are met, the lessee is in no position to exercise its right of first refusal. Grumman's connection with the property will come to an end at the termination of the lease. Since Grumman is under no obligation to purchase the property and in no position to bring about an opportunity in which to exercise its right of first refusal, it cannot be said, as matter of fact or as matter of law, that Grumman is a vendee in possession under an executory contract of purchase. So viewed, Grumman has no interest in the facilities subject to assessment and taxation within the meaning of subdivision 17 of section 4. It is only when the Government holds

a bare legal title analogous to a mortgage that the immunity of the United States no longer attaches (Tax Law, § 4, subd. 1). When such is the case, the assessment for taxation "shall be at the full value of such property without deduction", the same as if the legal title were held by the vendee (Tax Law, § 4, subd. 17). Nothing in subdivision 17 of section 4 conflicts with Federal law. As we read section 522e of title 34 of the United States Code (Note 4 above, p. 505), the United States has consented to a waiver of its immunity from taxation to the extent of permitting local taxation of a lessee's interest in Government property. The Federal statute is, however, permissive only and no tax is possible unless local law authorizes and provides for it. Since subdivision 17 of section 4 authorizes the assessment of the interest of the party in possession "in the same manner as if" it "held the legal title" to the property owned by the United States and that it be assessed "at the full value of such property", the question arises whether this section is void because it disregards and exceeds the limited nature of the United States Government's waiver which extends only to the "lessee's interest". The answer to that question is to be found in *United States* v. *County of Allegheny*, (322 U. S. 174, 187-189, *supra*), wherein the court said:

> "We have held that where private interests in property were so preponderant that all the Government held was a naked title and a nominal interest, the whole value was taxable to the equitable owner. *Northern Pacific Ry. Co.* v. *Myers*, 172 U. S. 589; *New Brunswick* v. *United States*, 276 U. S. 547. But that is not the situation here, and the State has made no effort to segregate Mesta's interest and tax it. The full value of the property, including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Mesta's assessment. * * *
>
> "We hold that Government-owned property, to the full extent of the Government's interest therein,

is immune from taxation, either as against the Government itself or as against one who holds it as a bailee."

In the case before us, the respondents attempt to circumvent subdivision 1 of section 4 of the Tax Law which prevents the taxing of property of the United States, by categorizing the assessment as being on "interest under contract with U. S. of 4 1 54" and adding that "The interest of the United States or of this State in the foregoing property is not assessed or taxed". In so doing, they have disregarded the mandatory language of subdivision 17 of section 4 of the Tax Law, which provides that where taxable, the tax shall be "at the full value of such property". Respondents' reasoning to the effect that Grumman's services in supervising the construction of the Government buildings which Grumman subsequently leased from the Government (valued by respondents at $2,350,000) constituted real property taxable to Grumman, is unconvincing. There is no proof that such expenditures by Grumman gave it any right of ownership in the buildings, the construction of which they supervised. More reasonable is the assumption that such expenditures by Grumman were in the nature of additional rent, since nowhere is it provided that such amounts are to be reimbursed on termination or applied on the purchase price if, as and when Grumman has an opportunity to exercise its right of refusal.

The assessment and tax are, therefore, even if considered as authorized by subdivision 17 of section 4, either illegal because not made in conformity with the dictates of that section with respect to valuation, or, if considered as made at the full value of the property, void for lack of consent by the United States.

In dealing with the applicability of tax statutes, it is a basic rule not "to extend their provisions, by implication, beyond the clear import of the language used" (*American*

Locker Co. v. *City of New York*, 308 N. Y. 264, 269). In case of doubt, they are to be construed more strongly against the Government and in favor of the citizen (*Gould* v. *Gould*, 245 U. S. 151, 153; *Matter of Good Humor Corp.* v. *McGoldrick*, 289 N. Y. 452).

Finally, by way of summary, Grumman is not seeking an exemption from taxation. The property is not taxable by virtue of the overriding immunity of the United States Government as owner. It is the local government which is attempting to levy a tax where the property is already immune from taxation under a statute that has no application to the present situation. We are not dealing with an executory agreement whereby upon a certain payment or payments the legal title may be acquired. This agreement imposes a variety of other conditions besides "certain payment or payments."

Since we deem the assessment illegal *ab initio*, it is unnecessary to consider the question whether the petition by Grumman for review of the assessment should have been remanded for further proceedings.

The order of the Appellate Division should be reversed and that of the Supreme Court, Suffolk County, ordering the assessment stricken, affirmed, with costs in all courts.

Fuld, J. (dissenting). To see this case in proper perspective and, indeed, to envision the consequences of decision herein, it should be noted at the outset that we are concerned with a vast tract of real property in the Town of Riverhead, of over 4,400 acres, owned by the United States Government and occupied and used by the petitioner Grumman under an agreement with the government. If the property were owned by anyone but the United States (or the State of New York), it would concededly be subject to assessment and tax (Tax Law, § 4, subd. 17). Moreover, Congress actually passed a law expressly providing that

such an interest as that which Grumman obtained from the government, and which it now enjoys, "shall be made subject to State or local taxation" (U. S. Code, tit. 34, § 522e, also, §§ 522a-522c; these sections were repealed in 1956 and § 522e substantially re-enacted as § 2667, subd. [e] of tit. 10).

The sole question presented, therefore, is whether the Tax Law of this state provides for the assessment and taxation of Grumman's interest in such real property, and, it seems to me, a reading of subdivision 17 of section 4 of that statute compels an affirmative answer. In so many words, the legislature has provided that,

> "Whenever the legal title of real property is in the United States or in this state, but the use, occupation or possession thereof is in a corporation, association, co-partnership or individual * * * under a contract of sale or other agreement whereby upon certain payment or payments the legal title * * * may be acquired by such corporation, association, co-partnership or individual, his or its interest in such real property shall be assessed and taxed as real property".

The subdivision further provides that the interest of the corporation, "in the use, occupation or possession" of such property, "shall be assessed and taxed in the same manner as if [it] * * * held the legal title to such property, except for the addition to the description of the words 'interest under contract,' or other appropriate words descriptive of the interest in the property so assessed."

Grumman is not a vendee-in-possession, but the statute does not require that such it be to justify taxation of its interest. Title to the property is in the United States and Grumman is in possession, enjoying full use of the entire property, under a lease giving it an option to purchase at a specified price in the event that the government elects

to terminate the lease and dispose of the property as surplus. The agreement between the parties, after declaring that the "facilities" are not required for public use, placed the property in the possession of Grumman for general industrial purposes, including commercial air operations, at a rent of from $250,000 to $2,800,000 a year; it contained provisions (1) permitting Grumman to sublease, (2) requiring Grumman to expend $1,000,000 for the construction of additional buildings, (3) relating to insurance, with explicit specification that the loss, if any, shall be adjusted with Grumman and the proceeds, at the government's direction, payable to Grumman and (4) granting Grumman the first right to purchase.

We read subdivision 17 of section 4 as it is written, and, when so read, it plainly applies to an occupant such as Grumman, who is in possession of government-owned property under *any "agreement whereby* upon certain payment or payments *the legal title * * * may be acquired* by such [occupant]." The statute contains neither language nor intimation that its application is to be limited to a vendee-in-possession or a holder of the equitable title.

We are dealing, it is important to observe, not with a statute levying a tax—which I recognize is to be construed against the government—but with a claim of exemption from taxation, in which case "it must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption." (*People ex rel. Savings Bank of New London* v. *Coleman*, 135 N. Y. 231, 234.) That is as it should be, reflecting as it does a matter of high policy. An exemption from taxation relieves one class of persons or property from its obligation to bear its share of the expenses of government and throws a correspondingly higher burden upon all other classes, necessarily creating an inequality of taxation. The courts have, therefore, "uniformly refused to favor exemptions, and have

invariably construed statutes freeing property from the burden of enforced contribution to the expense of maintaining the government most rigidly against the claimant, and have declined to countenance such immunity unless the language of the statute is clear and unambiguous, and unless the purpose of the Legislature to exempt such property indisputably appears." (*Matter of Board of Educ., Jamestown* v. *Baker*, 241 App. Div. 574, 575-576, affd. 266 N. Y. 636.)

Certainly, it may not be said that it "indisputably appears" that it was the legislative purpose to exempt from all taxation the real property now being occupied and used by Grumman. On the contrary, the language of subdivision 17 bespeaks an unmistakable intent not to exempt it. In point of fact, were we to uphold Grumman's claim of exemption, we would be placing judicial sanction upon a method of tax avoidance directly opposed to the legislative design so clearly expressed in the statute.

The fact that a lease may be considered personalty, rather than real property, does not in and of itself advance Grumman's position. Quite obviously, a lease which contains a provision giving the tenant an option to purchase would be an "interest in real property." (See e.g., *Gilbert* v. *Van Kleeck*, 284 App. Div. 611, 617, appeal dismissed 308 N. Y. 882; *Sinclair Refining Co.* v. *Clay*, 102 F. Supp. 732, 734, affd. 194 F. 2d 532; *London & South Western Ry. Co.* v. *Gomm*, 20 Ch. D. 562, 581.) And, beyond this, I would but observe that the legislature, fully empowered to classify property for tax purposes in any manner it deems proper (see e.g., *People ex rel. Hudson Riv. Day Line* v. *Franck*, 257 N. Y. 69; opinion of DYE, J., p. 507), has here provided that "The classification of such property or any part thereof as real property for the purposes of taxation under this chapter shall not be affected by any provision of the contract or agreement under which the same is held" (Tax

Law, § 4, subd. 17). To me it seems evident that petitioner, in urging that its "leasehold" is personalty, has overlooked the statute's significant provision that the interest of a corporation in property owned by the United States, of which it has the use, occupation or possession under an agreement whereby it may acquire legal title upon certain payments, "shall be assessed and taxed as real property" (Tax Law, § 4, subd. 17.)

The assessors of the Town of Riverhead acted within constitutional limits in assessing Grumman's interest in the property. The Appellate Division was fully warranted in dismissing the petition and, accordingly, its order should be affirmed.

DESMOND, FROESSEL and VAN VOORHIS, JJ., concur with DYE, J.; FULD, J., dissents in an opinion in which CONWAY, Ch. J., and BURKE, J., concur.

Order of Appellate Division reversed and that of Special Term reinstated, with costs in this court and in the Appellate Division.

Judgment of Court of Appeals in Question

No. 216

COURT OF APPEALS

STATE OF NEW YORK

[SAME TITLE]

BE IT REMEMBERED, That on the 9th day of July in the the year of our Lord one thousand nine hundred and fifty-six,

Grumman Aircraft Engineering Corporation, the appellant—in this cause, came here unto the Court of Appeals, by Cahill, Gordon, Reindel & Ohl, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department.

And The Board of Assessors of the Town of Riverhead, New York, & ano., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Reginald C. Smith, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. John P. Ohl,

of counsel for the appellant—, and by Mr. Reginald C. Smith, of counsel for the respondents, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and that of Special Term reinstated, with costs in this Court and in the Appellate Division.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be reversed &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, March 8, 1957.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[Seal—State of New York, Court of Appeals]

/s/ Raymond J. Cannon
Clerk.

Order of Supreme Court on Court of Appeals Remittitur

COURT OF APPEALS

STATE OF NEW YORK

[SAME TITLE]

The above-named petitioner having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, Second Judicial Department, made herein and entered in the office of the Clerk of the said Appellate Division on the 14th day of May, 1956, which said order reversed an order of the Supreme Court, Suffolk County, herein, at Special Term, which order was duly entered in the office of the Clerk of the County of Suffolk on the 9th day of January, 1956, denying the motion of the respondents to dismiss the petition herein for insufficiency, finding that the assessments are illegal and directing respondents and all tax officials having jurisdiction thereof to strike the assessments from the assessment roll for the year 1955-56, and directed that said motion be granted, and the petitioner, having appealed as aforesaid, from each and every part of said order of reversal as well as from the whole thereof; and the said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said order of the Appellate Division of the Supreme Court so appealed from as aforesaid be reversed and that of Special Term reinstated, with costs in the Court of Appeals and in the Appellate Division, and having ordered and adjudged that the proceedings therein be remitted to this Supreme Court there to be proceeded upon according to law;

Now on reading and filing the remittitur from the said Court of Appeals herein, and upon motion of Cahill, Gordon,

Reindel & Ohl, attorneys for the petitioner herein, it is hereby

ORDERED that the said order of the said Court of Appeals be and the same hereby is made the order of this Court; and that the order entered herein on the 9th day of January, 1956, be and the same hereby is affirmed and reinstated, with costs and disbursements of said appeals in the said Appellate Division and in the Court of Appeals to be taxed against the respondents.

Enter.

s/ L. B. HILL
J. S. C.

Granted: March 27, 1957
ALEX JAEGER, Clerk

Filed: March 27, 1957
ALEX JAEGER, Clerk

Order of Court of Appeals Denying Reargument But Amending Remittitur

[Same Title]

A motion for reargument or, in the alternative, to amend the remittitur in the above cause having been heretofore made upon the part of the respondents herein and papers having been submitted thereon and due deliberation having been thereupon had, it is.

Ordered, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

Further Ordered, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution and statutes of the United States, to wit: Respondents argued that, under the appropriate provisions of the Constitution of the United States which define the powers of the federal government (Article IV, clause 3; Article I, clause 18 and Article VI, clause 2), the Act of August 5, 1947 (c. 493, § 6, 34 U. S. C. § 522 e) and the contract between appellant and the United States government entered into in pursuance thereof mandated that the property involved herein be made subject to local taxation. This Court held that such taxation was not mandated."

And the Supreme Court, Suffolk County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Gearon Kimball
Deputy Clerk.

(SEAL)

Order of Supreme Court on Amendment of Remittitur

[Same Title]

The above-named Respondents having applied to the Court of Appeals of the State of New York for a reargument of the appeal herein or in the alternative to amend the remittitur in the above cause, and the papers having been submitted, and after due deliberation the Court of Appeals having ordered and adjudged that the motion insofar as it sought reargument was denied, and that the motion insofar as it sought to amend the remittitur was granted, and having ordered and adjudged that the remittitur be amended in the manner specified in the order of said Court, and upon motion of Reginald C. Smith, attorney for the Respondents herein, it is hereby

Ordered, that the said order of the Court of Appeals directing the amendment of the remittitur and bearing date the 12th day of April, 1957 be and the same hereby is made the order of this Court.

Enter,

S. R.
J. S. C.

Granted
Apr. 23, 1957
Alex Jaeger, Clerk